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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LISA STARRATT and THOMAS SIMMONS,  
as individuals, on behalf of themselves, the gen-  
eral public and those similarly situated,

Plaintiffs,

v.

FERMENTED SCIENCES, INC.,

Defendant.

CASE NO.

**CLASS ACTION COMPLAINT FOR  
VIOLATION OF THE CALIFORNIA  
CONSUMERS LEGAL REMEDIES  
ACT; FALSE ADVERTISING; FRAUD,  
DECEIT, AND/OR MISREPRESENTATION;  
UNFAIR BUSINESS PRACTICES;  
AND UNJUST ENRICHMENT**

JURY TRIAL DEMANDED

**INTRODUCTION**

1  
2 1. Plaintiffs Lisa Starratt and Thomas Simmons, by and through their counsel, bring  
3 this class action against Fermented Sciences, Inc. d/b/a Flying Embers (“Defendant”) to seek re-  
4 dress for Defendant’s deceptive and unlawful practices in labeling and marketing its Flying Em-  
5 bers Hard Seltzer.

6 2. Consumers are increasingly interested in getting health benefits from their food  
7 and drink. Consumers are attracted to “better for you” products that are healthier than other alter-  
8 natives in food and beverage categories that are not typically healthy (or even unhealthy). To  
9 make healthy choices, consumers rely on food and drink product labels.

10 3. Intending to profit from consumers’ increasing desire to consume healthy food and  
11 drink, Defendant fortified its alcoholic beverage by sprinkling nutrients into a beverage that is  
12 lawfully required to disclose harmful health effects. 27 U.S.C. § 215. Of course, adding an insig-  
13 nificant amount of nutrients to an alcoholic beverage will do little to overcome the harmful effects  
14 of alcohol.

15 4. But Defendant did just this. Defendant fortified its Flying Embers Hard Seltzers  
16 with an insignificant amount of Vitamin C and probiotics, and then promoted on the labels and  
17 advertising that the seltzers contained “ANTIOXIDANT VIT C + LIVE PROBIOTICS” and were  
18 “BREWED WITH SUPERFRUITS.” Defendant’s campaign is both misleading and dangerous to  
19 consumers. It is also unlawful, as Defendant’s labels violate FDA regulations and policies ac-  
20 knowledging such danger.

21 5. Accordingly, Defendant’s manufacturing, labeling, and advertising of the Flying  
22 Embers Hard Seltzers as containing “ANTIOXIDANT VIT C + LIVE PROBIOTICS” and  
23 “BREWED WITH SUPERFRUITS” and the other representations detailed herein are unlawful,  
24 misleading, and designed to deceive consumers into purchasing the Flying Embers Hard Seltzers.  
25 Plaintiffs bring this action to stop Defendant’s misleading practices.

**PARTIES**

26  
27 6. Lisa Starratt (“Plaintiff”) is, and at all times alleged in this Class Action Complaint  
28 was, an individual and a resident of Walnut Creek, California.



low calorie, low sugar, inexpensive alcoholic drink. They are marketed to health-conscious consumers.

16. The Flying Embers Hard Seltzers predominately, uniformly, and consistently state on the principal display panel of the product labels that they are made with “ANTIOXIDANT VIT C + LIVE PROBIOTICS” and “BREWED WITH SUPERFRUITS.” Flying Embers Hard Seltzers come in a variety of flavors, including Pineapple Cayenne, Watermelon Chili, Guava Jalapeño, Clementine Hibiscus, Black Cherry Rose, and Passionfruit Elderflower. These products, and any other flavors or Flying Embers Hard Seltzers that make a claim regarding antioxidant Vitamin C, probiotics, and/or superfruits will hereinafter be referred to as the “Products.”

17. The representation that the Products contain and provide antioxidant vitamin C and live probiotics was uniformly communicated to Plaintiffs and every other person who purchased any of the Products in California and the United States. The same or substantially similar product label has appeared on each respective product during the entirety of the Class Period in the general form of the following examples:



18. The Products’ front label emphasizes “ANTIOXIDANT VIT C + LIVE PROBIOTICS” and “BREWED WITH SUPERFRUITS.”

19. An example of the ingredients in the Products is shown below:



20. In recent years, consumer demand for hard seltzers has exploded. In 2018, hard seltzer sales were a mere \$210 million and in 2019, sales sky-rocketed to \$1.2 billion with no signs of slowing.

21. In order to distinguish Flying Embers in the bullish market of hard seltzers, Defendant has fortified the Products to distract from the severe harm that may occur from alcohol consumption. Seeking to cash in on the hard seltzer craze, Defendant has violated FDA policies and regulations and for the reasons described herein, its labels are misleading and deceptive.

### **The Products Are Harmful**

22. Federal regulations require that the Products bear the following warning: “GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and **may cause health problems.**” 27 U.S.C. § 215 (emphasis added).

23. In enacting this requirement, Congress found that “the American public should be informed about the health hazards that may result from the consumption or abuse of alcoholic beverages.”<sup>1</sup>

24. The nutrient content of alcoholic beverages is usually negligible. Because they provide almost no nutrients, alcoholic beverages are considered “empty calories.”<sup>2</sup>

25. Over the long-term, consuming excess alcohol can also impair the body’s ability to digest and utilize nutrients.<sup>3</sup>

26. Alcohol is a diuretic, causing the kidneys to remove fluid from the body more quickly than normal. This process of elimination takes precedence over all other metabolic processes, including the absorption of nutrients and minerals. Thus, the Products will do little to contribute to the nutrient needs of an adult.

27. The United States Department of Agriculture’s 2020-2025 Dietary Guidelines for Americans (DGA) encourage “[a]dults who choose to drink . . . to limit daily intakes . . . so as not to exceed daily calorie limits,” and cautions that, in general, “drinking less is better for health than drinking more.”<sup>4</sup>

28. Evidence indicates that, among those who drink, higher average alcohol consumption is associated with an increased risk of death from all causes compared with lower average alcohol consumption. Emerging evidence suggests that even drinking within the recommended

<sup>1</sup> ANTI-DRUG ABUSE ACT OF 1988, 1988 Enacted H.R. 5210, 100 Enacted H.R. 5210, 102 Stat. 4181, 4518, 100 P.L. 690, 1988 Enacted H.R. 5210, 100 Enacted H.R. 5210

<sup>2</sup> Lieber CS. Relationships Between Nutrition, Alcohol Use, and Liver Disease, Relationships Between Nutrition, Alcohol Use, and Liver Disease. National Institutes of Health. 2004. <https://pubs.niaaa.nih.gov/publications/arh27-3/220-231.htm>

<sup>3</sup> Lieber CS. Alcohol: its metabolism and interaction with nutrients. *Annu Rev Nutr.* 2000;20:395-430.

<sup>4</sup> U.S. Department of Agriculture and U.S. Department of Health and Human Services. Dietary Guidelines for Americans 2020-2025. 2020. p49. [https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary\\_Guidelines\\_for\\_Americans\\_2020-2025.pdf](https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary_Guidelines_for_Americans_2020-2025.pdf)

limits may increase the overall risk of death from various causes, such as from several types of cancer and some forms of cardiovascular disease.<sup>5</sup>

29. According to the CDC, “Excessive alcohol use is responsible for more than 95,000 deaths in the United States each year, or 261 deaths per day. These deaths shorten the lives of those who die by an average of almost 29 years, for a total of 2.8 million years of potential life lost. It is a leading cause of preventable death in the United States, and cost the nation \$249 billion in 2010.”<sup>6</sup>

30. Worse, “[m]ore than half of alcohol-attributable deaths are due to health effects from drinking too much over time, such as various types of cancer, liver disease, and heart disease.”<sup>7</sup>

### **The Products Do Not Provide Health Benefits**

31. Attempting to overcome the deleterious health impact of the Products, Defendant added Vitamin C to the Products and includes “ANTIOXIDANT VIT C + LIVE PROBIOTICS” and “BREWED WITH SUPERFRUITS” on the label.

32. Scientific research suggests that isolated antioxidants, such as the vitamin C added to the Products, do not provide the same health benefits as antioxidants from a diet rich in fruits and vegetables. Antioxidants are sought because they may reduce the risk of many diseases. Antioxidants scavenge free radicals from the body cells and prevent or reduce the damage caused by oxidation. However, clinical trials indicate that individual antioxidants taken alone do not appear to have preventative effects.<sup>8</sup>

33. In this regard, the United States Department of Agriculture notes that:

[a]n underlying premise of the Dietary Guidelines is that nutritional needs should be met primarily from foods and beverages—specifically, nutrient-dense foods and beverages. ... Nutrient-dense

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<sup>5</sup> *Id.*

<sup>6</sup> Centers for Disease Control and Prevention, Alcohol and Public Health, <https://www.cdc.gov/alcohol/features/excessive-alcohol-deaths.html> (last accessed June 29, 2022).

<sup>7</sup> *Id.*

<sup>8</sup> See National Institutes of Health, Office of Dietary Supplements, Vitamin C Fact Sheet for Consumers, available at <https://ods.od.nih.gov/factsheets/list-all/#VitaminC>.



1 foods and beverages provide vitamins, minerals, and other health-  
 2 promoting components...<sup>9</sup>

3 34. Moreover, consumers simply seeking to meet the RDI for vitamin C are also un-  
 4 likely to experience health benefits from the Products. The National Institutes of Health confirms  
 5 that vitamin C deficiency is rare, and the average American likely exceeds the RDI for vitamin  
 6 C.<sup>10</sup> Because vitamin C is water soluble, the body does not store excess vitamin C that a human  
 7 consumes, meaning the excess vitamin C will likely pass through the body.

8 35. This is particularly true in the context of consuming alcohol. Alcohol is a toxin and  
 9 when consumed, the body prioritizes removal of the toxin over all other processes, including me-  
 10 tabolizing nutrients. Thus, alcohol consumption interferes with nutrient absorption, and even  
 11 where a body absorbs nutrients, alcohol prevents the body from using nutrients by altering the  
 12 transport, metabolism, and storage of nutrients.<sup>11</sup>

13 36. Defendant's use of the term "live probiotics" on the Product labels further implies  
 14 that the Products are healthy. Live probiotics are associated with healthy bacteria that benefits gut  
 15 health. However, alcohol kills probiotics, meaning there is likely little, if any, probiotics in the  
 16 drink by the time of consumption. Combined with the fact that alcohol inhibits metabolism and  
 17 absorption, consumers do not receive the benefit of "live probiotics" when consuming the Prod-  
 18 ucts.

19 37. Further, Defendants' use of the term "superfruit" on the Product labels further im-  
 20 plies that the Products are healthy. The term "superfruit" has become an industry term to denote  
 21 nutrient-dense fruits, synonymous with "healthy" and "nutritious." However, little evidence sup-  
 22 ports the claim that a dusting of superfruit powder provides benefits associated with consumption  
 23 of a fresh "superfruit."

24 <sup>9</sup> United States Department of Agriculture, Dietary Guidelines for Americans, 2020-2025, Execu-  
 25 tive Summary, pgs. ix-x (available at <https://www.dietaryguidelines.gov/>).

26 <sup>10</sup> National Institutes of Health, Office of Dietary Supplements, Vitamin C Fact Sheet for Con-  
 27 sumers, available at <https://ods.od.nih.gov/factsheets/VitaminC-Consumer/> (accessed June 11,  
 28 2021).

<sup>11</sup> Lieber, Charles S. "Alcohol and nutrition; an overview." *Alcohol Health & Research World*,  
 vol. 13, no. 3, 1989, p. 197+. *Gale Academic OneFile*,  
[link.gale.com/apps/doc/A8191860/AONE?u=anon~4ce0ada0&sid=googleScholar&xid=296d4991](https://link.gale.com/apps/doc/A8191860/AONE?u=anon~4ce0ada0&sid=googleScholar&xid=296d4991).  
 Accessed 14 July 2021.



38. In summary, Defendant's representations "ANTIOXIDANT VIT C + LIVE PROBIOTICS" and "BREWED WITH SUPERFRUITS" on the Products misleads reasonable consumers into believing that the antioxidant content of the Products provides health benefits. The minimal amount of vitamin C and live probiotics in the Products will not provide consumers with the health benefits that Defendant's representations lead them to expect, and even worse, the Product is actually dangerous to consumers' health.

39. Defendant's use of the representations "ANTIOXIDANT VIT C + LIVE PROBIOTICS" and "BREWED WITH SUPERFRUITS" and the other representations and images detailed herein in the marketing, labeling, and advertising of the Products is thus nothing more than a marketing gimmick intended to deceive consumers into purchasing the Products. Accordingly, Defendant's representations concerning the nutritional qualities, health qualities, and ingredients of the Products are misleading, deceptive, and unlawful.

#### **Federal and State Regulations**

40. The Federal Food, Drug, and Cosmetics Act (the "FDCA"), 21 U.S.C. § 343(a), provides that a food is misbranded if "its labeling is false or misleading in any particular."

41. The FDA has provided guidance that fortification of certain products, including carbonated beverages, is not appropriate. 21 C.F.R. § 104.20 (the "Fortification Policy").<sup>12</sup> The Fortification Policy states that "The random fortification of foods . . . could result in deceptive and misleading claims."

42. Specifically, under the Fortification Policy, the FDA "does not encourage indiscriminate addition of nutrients to foods, nor does it consider it appropriate to fortify . . . snack foods such as . . . carbonated beverages." *See* 21 C.F.R. § 104.20(a).

43. In a 2015 Q&A Guidance Document relating to the Fortification Policy, the FDA was unequivocal:

#### **B4. Is it appropriate to add vitamins and minerals to alcoholic beverages?**

<sup>12</sup> Under the U.S. Internal Revenue Code "IRC" 27 CFR Part 7, a malt-based hard seltzer is considered a malt beverage which is subject to TTB Labeling and advertising regulations, while a sugar-based hard seltzer is considered "beer" and is subject to FDA regulation. The alcohol in the Products is derived from sugar, and therefore, are subject to FDA regulations.

No. Under our fortification policy, we do not consider it appropriate to add vitamins and minerals to alcoholic beverages.

44. The Fortification Policy defines “fortification” as “the addition of a vitamin, mineral, or protein to a food.” The use of the “superfruit blend” in the Products is fortification because this ingredient is used to add Vitamin C.

45. The Fortification Policy is a guidance that is binding in certain circumstances. For example, where a food advertises the fortification using words like “added,” “plus,” or other synonyms, the Policy is binding. *See* 21 C.F.R. 101.54(e).

46. Identical federal and California laws regulate the content of labels on packaged food and drink. The requirements of the FDCA, and its labeling regulations, including those set forth in 21 C.F.R. §§ 101, 102, were adopted by the California legislature in the Sherman Food Drug & Cosmetic Law (the “Sherman Law”). California Health & Safety Code § 110100 (“All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state.”). The federal laws and regulations discussed below are applicable nationwide to all sales of packaged food products. Additionally, no state imposes different requirements on the labeling of packaged food for sale in the United States.

47. Under the FDCA, the term misleading is a term of art that covers labels that are technically true, but are likely to deceive consumers. Under the FDCA, if any single representation on the labeling is false or misleading, the entire food is misbranded, and no other statement in the labeling can cure a misleading statement.

48. Further, in addition to its blanket adoption of federal labeling requirements, California has also enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations. *See* California Health & Safety Code § 110660 (misbranded if label is false and misleading).

49. Under California law, a food product that is “misbranded” cannot legally be manufactured, advertised, distributed, sold, or possessed. Misbranded products have no economic value and are legally worthless.

**Defendant's Marketing and Labeling of its Products Violates State and Federal Food Labeling Laws**

50. As the FDA recognizes in its Fortification Policy, the fortification of unhealthy foods, such as alcoholic and carbonated beverages, is misleading and deceptive to consumers. The Products deceive consumers by implying health benefits, despite the fact that the alcohol in the product prohibits any possible benefits from the scant amount of nutrients in the Products. Moreover, on information and belief, the claim of live probiotics is false given the presence of alcohol in the Products that kills probiotics. The deception is further compounded by the use of the term “superfruit,” which suggests that the Products, because of their nutrient content, may help consumers maintain healthy dietary practices despite federal agencies recommending limits on alcohol consumption because of the hazards associated with it. Thus, the Products are misleading and therefore misbranded.

51. Further, the Products are required to comply with the Fortification Policy because the Products make “more” claims regulated by 21 C.F.R. § 101.54(e).

52. The term “+” in the context of the statement ““ANTIOXIDANT VIT C + LIVE PROBIOTICS” is a synonym for “added” or “plus” because it signifies the addition of the nutrient. Where a product makes a “plus” claim, the product *must* comply with the Fortification Policy. 21 C.F.R. § 101.54(e)(ii). Therefore, the Fortification Policy is binding on the Products. 21 C.F.R. § 101.54(e).

53. The Products violate the Fortification Policy because they are carbonated, alcoholic beverages that are fortified with the nutrient Vitamin C. Moreover, the Products do not meet any of the other conditions for fortification as provided in the Fortification Policy. See 21 C.F.R. § 104.20(b)-(e). The Products are therefore unlawfully fortified, and the Product labels contain prohibited nutritional claims. Thus, the Products are misbranded.

54. The Products are unlawful, misbranded, and violate the Sherman Law, California Health & Safety Code § 110660, *et seq.*, because the Products’ labels state that they are made “with ANTIOXIDANT VIT C + LIVE PROBIOTICS” and “BREWED WITH SUPERFRUITS,” implying the Products are a healthful source of nutrients, even though FDA guidance states that

1 fortification of alcoholic, carbonated beverages is not appropriate and would result in misleading  
2 consumers.

3 55. Defendant's marketing, advertising, and sale of the Products violates the false ad-  
4 vertising provisions of the Sherman Law (California Health & Safety Code § 110390, *et seq.*),  
5 including but not limited to:

- 6 a. Section 110390, which makes it unlawful to disseminate false or misleading food  
7 advertisements that include statements on products and product packaging or  
8 labeling or any other medium used to directly or indirectly induce the purchase of a  
9 food product;
- 10 b. Section 110395, which makes it unlawful to manufacture, sell, deliver, hold or offer  
11 to sell any falsely or misleadingly advertised food; and
- 12 c. Sections 110398 and 110400, which make it unlawful to advertise misbranded food  
13 or to deliver or proffer for delivery any food that has been falsely or misleadingly  
14 advertised.

15 56. Defendant's marketing, advertising, and sale of the Products violates the  
16 misbranding provisions of the Sherman Law (California Health & Safety Code § 110660, *et seq.*),  
17 including, but not limited to:

- 18 a. Section 110665 (a food is misbranded if its labeling does not conform with the  
19 requirements for nutrition labeling as set forth in 21 U.S.C. Sec. 343(q));
- 20 b. Section 110705 (a food is misbranded if words, statements and other information  
21 required by the Sherman Law to appear food labeling is either missing or not  
22 sufficiently conspicuous);
- 23 c. Section 110760, which makes it unlawful for any person to manufacture, sell,  
24 deliver, hold, or offer for sale any food that is misbranded;
- 25 d. Section 110765, which makes it unlawful for any person to misbrand any food; and
- 26 e. Section 110770, which makes it unlawful for any person to receive in commerce any  
27 food that is misbranded or to deliver or proffer for delivery any such food.

28 57. Defendant has violated 21 U.S.C. § 343(a), and the standards set by FDA

1 regulations, including, but not limited to, 21 C.F.R. § 101.65(d), which have been incorporated by  
2 reference in the Sherman Law, by fortifying the Products and misleading consumers with claims  
3 of healthfulness.

4 58. A reasonable consumer would expect that the Products are a source of nutrients  
5 and probiotics, that consumption of the Products benefits physical health and that the labels  
6 would not be contrary to the policies or regulations of the State of California and/or the FDA.

7 59. Consumers lack the meaningful ability to test or independently ascertain the truth-  
8 fulness of Defendant's food labeling claims, especially at the point of sale. Consumers would not  
9 know that the Products are unlawfully fortified and unlawfully labeled. Its discovery requires in-  
10 vestigation well beyond the grocery store aisle and knowledge of FDA regulations and food  
11 chemistry beyond that of the average consumer. An average consumer does not have the special-  
12 ized knowledge necessary to ascertain that the deleterious effects of alcohol overtime will not be  
13 overcome by the fortification of the Products with scant amounts of Vitamin C or that the alcohol  
14 in the beverages will interfere with the metabolism of the vitamin C and probiotics. Nor does an  
15 average consumer have the specialized knowledge to ascertain that alcohol kills probiotics, such  
16 that there are little or no probiotics in the beverages. Therefore, consumers had no reason to in-  
17 vestigate whether the Products actually are a healthful source of nutrients as the labels claim.  
18 Thus, reasonable consumers relied on Defendant's representations regarding the nature of the  
19 Products.

20 60. Defendant intends and knows that consumers will and do rely upon food labeling  
21 statements in making their purchasing decisions. Defendant intends consumers to understand the  
22 label claims to communicate health benefits. Indeed, Defendant's website labels the hard seltzers  
23 as "Buzz with Benefits."<sup>13</sup> The Vice President of Flying Embers has said "Flying Embers, at its  
24 most basic form, stands for 'better-for-you alcohol.'"<sup>14</sup>

25  
26  
27 <sup>13</sup> <https://www.flyingembers.com/pages/seltzer-collection> (last accessed May 18, 2022).

28 <sup>14</sup> <https://entertainermag.com/blog/2020/04/23/fermented-fun-flying-embers-brings-alcoholic-kombucha-to-arizona/> (last accessed May 18, 2022).

61. Label claims and other forms of advertising and marketing drive product sales, particularly if placed prominently on the front of product packaging, as Defendant has done with the claim that the Products are a healthful source of nutrients and probiotics.

**Defendant Intends to Continue to Market the Products as Containing Antioxidant Vitamin C, Live Probiotics, and Superfruit**

62. Because consumers pay a price premium for products that contain antioxidants, probiotics, and superfruit because such products are perceived as providing health benefits, Defendant is able to both increase its sales and retain more profits by fortifying its Products and labeling its Products as containing nutrients, probiotics, and superfruit.

63. Defendant engaged in the practices complained of herein to further its private interests of: (i) increasing sales of the Products while decreasing the sales of competitors' products that are not unlawfully fortified and labeled, and/or (ii) commanding a higher price for the Products because consumers will pay more for them due to consumers' demand for healthful products.

64. The market for hard seltzer products is continuing to grow and expand, and because Defendant knows consumers rely on representations about the antioxidant vitamin C, probiotics, and superfruit in the Products, Defendant has an incentive to continue to make such false and misleading representations. In addition, other trends suggest that Defendant has no incentive to change its labeling practices.

65. For example, one market analysis revealed that the market for hard seltzers is expected to grow at a 16% compound annual growth rate through 2027.<sup>15</sup>

66. Defendant continues to launch new flavors and lines to diversify its portfolio to maintain its competitive edge, making it likely that Defendant will continue to unlawfully fortify the Products and misleadingly advertise the Products to perpetuate the misrepresentations regarding the healthfulness of the Products.

<sup>15</sup> <https://www.toptal.com/finance/market-research-analysts/hard-seltzer-industry#:~:text=The%20global%20hard%20seltzer%20market,US%2C%20Canada%2C%20and%20Australia.>

**PLAINTIFFS' EXPERIENCES**

**Lisa Starratt**

67. Plaintiff Starratt purchased variety 12-packs of Flying Embers Hard Seltzer on multiple occasions from her local retailers including BevMo in Walnut Creek and Total Wine in Pleasant Hill, California during the period of 2020-2021, including a purchase on May 14, 2021, from Total Wine in Pleasant Hill, California.

68. Plaintiff Starratt made each of her purchases after reading and relying on Defendant's product label that advertised "ANTIOXIDANT VIT C + LIVE PROBIOTICS" and "BREWED WITH SUPERFRUITS." She believed the Products would provide physical health benefits.

69. At the time of each of her purchases of the Products, Plaintiff Starratt did not know that the Products were unlawfully fortified and labeled and would not provide the claimed nutritional benefits. As a result of Defendant's misrepresentations and omissions, the Products have no, or, at a minimum, a much lower value to Plaintiff.

70. Plaintiff Starratt not only purchased the Products because of the unlawful and misleading labeling, but she also paid more money for the Products than she would have paid for other or a similar alcoholic beverage product that was not unlawfully fortified and labeled with misleading nutrient content claims.

71. Had Defendant not misrepresented (by omission and commission) the true nature of the Products, Plaintiff would not have purchased them or, at a very minimum, he would have paid less for the Products.

72. Plaintiff Starratt continues to desire to purchase alcohol products, including those marketed and sold by Defendant. If the Products were reformulated to remove the nutrients, and labeled without the unlawful nutrient claims, Plaintiff would likely purchase the Products again in the future. Plaintiff regularly visits stores where the Products and other hard seltzers are sold.

**Thomas Simmons**

73. Mr. Simmons purchased variety 12 packs of Flying Embers Hard Seltzer from local stores including Whole Foods in Pasadena, California in the Fall and/or Winter of 2021.



1           74. Plaintiff Simmons made each of his purchases after reading and relying on Defen-  
2 dant's product label that advertised "ANTIOXIDANT VIT C + LIVE PROBIOTICS" and  
3 "BREWED WITH SUPERFRUITS." He believed the Products would provide physical health  
4 benefits.

5           75. At the time of each of his purchases of the Products, Plaintiff Simons did not know  
6 that the Products were unlawfully fortified and labeled and would not provide the claimed nutri-  
7 tional benefits. As a result of Defendant's misrepresentations and omissions, the Products have  
8 no, or, at a minimum, a much lower value to Plaintiff.

9           76. Plaintiff Simmons not only purchased the Products because of the unlawful and  
10 misleading labeling, but he also paid more money for the Products than he would have paid for  
11 other or a similar alcoholic beverage product that was not unlawfully fortified and labeled with  
12 misleading nutrient content claims.

13           77. Had Defendant not misrepresented (by omission and commission) the true nature  
14 of the Products, Plaintiff would not have purchased them or, at a very minimum, he would have  
15 paid less for the Products.

16           78. Plaintiff Simmons continues to desire to purchase alcohol products, including  
17 those marketed and sold by Defendant. If the Products were reformulated to remove the nutrients,  
18 and labeled without the unlawful nutrient claims, Plaintiff would likely purchase the Products  
19 again in the future. Plaintiff regularly visits stores where the Products and other hard seltzers are  
20 sold.

21           79. Plaintiffs and members of the Class have been economically damaged by their  
22 purchase of the Products because the advertising for the Products was and is untrue and/or  
23 misleading under California law and the products are misbranded; therefore, the Products are  
24 worth less than what Plaintiffs and members of the Class paid for them and/or Plaintiffs and  
25 members of the Class did not receive what they reasonably intended to receive.

**CLASS ALLEGATIONS**

80. Plaintiffs bring this class action lawsuit on behalf of themselves and a proposed class of similarly situated persons, pursuant to Rule 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure. Plaintiffs seek to represent the following groups of similarly situated persons, defined as follows:

49-State Class: All persons in each state except Illinois who purchased the Products between July 1, 2018 and the present.

California Subclass: All persons in the state of California who purchased the Products between July 1, 2018 and the present.

81. This action has been brought and may properly be maintained as a class action against Defendant because there is a well-defined community of interest in the litigation and the proposed classes are easily ascertainable.

82. Numerosity: Plaintiffs do not know the exact size the Classes, but they estimate that each is composed of more than 100 persons. The persons in the Classes are so numerous that the joinder of all such persons is impracticable and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the courts.

83. Common Questions Predominate: This action involves common questions of law and fact to the potential classes because each class member's claim derives from the deceptive, unlawful and/or unfair statements and omissions that led consumers to believe that the Products provide health benefits as represented on the Product labels. The common questions of law and fact predominate over individual questions, as proof of a common or single set of facts will establish the right of each member of the Classes to recover. The questions of law and fact common to the Classes are:

- a. Whether the marketing, advertising, packaging, labeling, and other promotional materials for the Products are deceptive and/or unlawful;
- b. Whether Defendant's actions violate Federal and California laws invoked herein;
- c. Whether the fortification of the Products is unlawful;
- d. Whether labeling the Products with false and misleading claims causes them to command a price premium in the market as compared with similar products that do

1 not make such misrepresentations;

2 e. Whether Defendant's advertising and marketing regarding the Products sold to the  
3 class members was likely to deceive reasonable consumers;

4 f. Whether representations regarding the antioxidant vitamin C and probiotics in the  
5 Products are material to a reasonable consumer;

6 g. Whether representations regarding the use of a superfruit in the Products are  
7 material to a reasonable consumer;

8 h. Whether Defendant engaged in the behavior knowingly, recklessly, or negligently;

9 i. The amount of profits and revenues earned by Defendant as a result of the  
10 conduct;

11 j. Whether class and subclass members are entitled to restitution, injunctive and  
12 other equitable relief and, if so, what is the nature (and amount) of such relief; and

13 k. Whether class and subclass members are entitled to payment of actual, incidental,  
14 consequential, exemplary and/or statutory damages plus interest thereon, and if so,  
15 what is the nature of such relief.

16 84. Typicality: Plaintiffs' claims are typical of the claims of the other members of the  
17 Classes because, among other things, all such claims arise out of the same wrongful course of  
18 conduct engaged in by Defendant in violation of law as complained of herein. Further, the  
19 damages of each member of the Classes were caused directly by Defendant's wrongful conduct in  
20 violation of the law as alleged herein.

21 85. Adequacy of Representation: Plaintiffs will fairly and adequately protect the  
22 interests of all class and subclass members because it is in their best interests to prosecute the  
23 claims alleged herein to obtain full compensation due to them for the unfair and illegal conduct of  
24 which they complains. Plaintiffs also have no interests that are in conflict with, or antagonistic to,  
25 the interests of class and subclass members. Plaintiffs have retained highly competent and  
26 experienced class action attorneys to represent their interests and that of the classes. By prevailing  
27 on their own claims, Plaintiffs will establish Defendant's liability to all class and subclass  
28 members. Plaintiffs and their counsel have the necessary financial resources to adequately and

1 vigorously litigate this class action, and Plaintiffs and counsel are aware of their fiduciary  
 2 responsibilities to the class and subclass members and are determined to diligently discharge  
 3 those duties by vigorously seeking the maximum possible recovery for class and subclass  
 4 members.

5 86. Superiority: There is no plain, speedy, or adequate remedy other than by  
 6 maintenance of this class action. The prosecution of individual remedies by members of the  
 7 classes will tend to establish inconsistent standards of conduct for Defendant and result in the  
 8 impairment of class members' rights and the disposition of their interests through actions to  
 9 which they were not parties. Class action treatment will permit a large number of similarly  
 10 situated persons to prosecute their common claims in a single forum simultaneously, efficiently,  
 11 and without the unnecessary duplication of effort and expense that numerous individual actions  
 12 would engender. Furthermore, as the damages suffered by each individual member of the classes  
 13 may be relatively small, the expenses and burden of individual litigation would make it difficult  
 14 or impossible for individual members of the classes to redress the wrongs done to them, while an  
 15 important public interest will be served by addressing the matter as a class action.

16 87. Plaintiffs are unaware of any difficulties that are likely to be encountered in the  
 17 management of this action that would preclude its maintenance as a class action.

### 18 **CAUSES OF ACTION**

19 88. Plaintiffs do not plead, and hereby disclaims, causes of action under the FDCA and  
 20 regulations promulgated thereunder by the FDA. Plaintiffs rely on the FDCA and FDA  
 21 regulations only to the extent such laws and regulations have been separately enacted as state law  
 22 or regulation or provide a predicate basis of liability under the state and common laws cited in the  
 23 following causes of action.

### 24 **PLAINTIFFS' FIRST CAUSE OF ACTION**

25 **(Violation of the Consumers Legal Remedies Act (the "CLRA"), California Civil Code §**  
 26 **1750, *et seq.*)**  
 27 **On Behalf of Plaintiffs and the Subclass**

28 89. Plaintiffs reallege and incorporate the paragraphs of this Class Action Complaint  
 as if set forth herein.

1           90. Defendant's actions, representations and conduct have violated, and continue to  
2 violate the CLRA, because they extend to transactions that are intended to result, or which have  
3 resulted, in the sale or lease of goods or services to consumers.

4           91. Plaintiffs and other class members are "consumers" as that term is defined by the  
5 CLRA in California Civil Code § 1761(d).

6           92. The Products that Plaintiffs (and other similarly situated subclass members)  
7 purchased from Defendant were "goods" within the meaning of California Civil Code § 1761(a).

8           93. Defendant's acts and practices, set forth in this Class Action Complaint, led  
9 customers to falsely believe that the Products provided health benefits as claimed on the product  
10 package. By engaging in the actions, representations and conduct set forth in this Class Action  
11 Complaint, Defendant has violated, and continues to violate, § 1770(a)(2), § 1770(a)(5),  
12 § 1770(a)(7), and § 1770(a)(8), of the CLRA. In violation of California Civil Code §1770(a)(2),  
13 Defendant's acts and practices constitute improper representations regarding the source,  
14 sponsorship, approval, or certification of the goods they sold. In violation of California Civil  
15 Code §1770(a)(5), Defendant's acts and practices constitute improper representations that the  
16 goods they sell have sponsorship, approval, characteristics, ingredients, uses, benefits, or  
17 quantities, which they do not have. In violation of California Civil Code §1770(a)(7), Defendant's  
18 acts and practices constitute improper representations that the goods it sells are of a particular  
19 standard, quality, or grade, when they are of another. In violation of California Civil Code  
20 §1770(a)(8), Defendant has disparaged the goods, services, or business of another by false or  
21 misleading representation of fact. Finally, regarding California Civil Code §1770(a)(8),  
22 Defendant falsely or deceptively markets and advertises that, unlike other alcoholic beverage  
23 product manufacturers, it sells Products that contain antioxidant vitamin C and probiotics.

24           94. Plaintiffs request that this Court enjoin Defendant from continuing to employ the  
25 unlawful methods, acts and practices alleged herein pursuant to California Civil Code  
26 § 1780(a)(2). If Defendant is not restrained from engaging in these types of practices in the  
27 future, Plaintiffs and the other members of the Class will continue to suffer harm. Plaintiffs and  
28 those similarly situated have no adequate remedy at law to stop Defendant continuing practices.

1           95.     **CIVIL CODE § 1782 NOTICE.** Plaintiffs notices and demands that within thirty  
 2 (30) days from that date of the filing of this Complaint, Defendant correct, repair, replace or oth-  
 3 erwise rectify the unlawful, unfair, false and or deceptive practices complained of herein.

4           96.     Should the violations herein alleged not be corrected or rectified as required by  
 5 Civil Code § 1782 within 30 days with respect to all Subclass Members, Plaintiffs will seek to  
 6 amend this Class Action Complaint to seek, on behalf of each Subclass Member, actual damages  
 7 of at least \$1,000, punitive damages, an award of \$5,000 for each Subclass Member who is a dis-  
 8 abled person or senior citizen, and restitution of any ill-gotten gains due to Defendant's acts and  
 9 practices.

10           97.     Plaintiffs also requests that this Court award their costs and reasonable attorneys'  
 11 fees pursuant to California Civil Code § 1780(d).

12                               **PLAINTIFFS' SECOND CAUSE OF ACTION**  
 13                               **(False Advertising, Business and Professions Code § 17500, *et seq.* ("FAL"))**  
 14                               **On Behalf of Plaintiffs and the Subclass**

15           98.     Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action  
 16 Complaint as if set forth herein.

17           99.     Beginning at an exact date unknown to Plaintiffs, but within three (3) years  
 18 preceding the filing of the Class Action Complaint, Defendant made deceptive and/or misleading  
 19 statements in connection with the advertising and marketing of the Products.

20           100.    Defendant made representations and statements (by omission and commission)  
 21 that led reasonable customers to believe that alcoholic beverages could be healthful sources of  
 22 nutrients.

23           101.    Plaintiffs and those similarly situated relied to their detriment on Defendant's  
 24 false, misleading and deceptive advertising and marketing practices, including each of the  
 25 misrepresentations and omissions set forth above. Had Plaintiffs and those similarly situated been  
 26 adequately informed and not intentionally deceived by Defendant, they would have acted  
 27 differently by, without limitation, refraining from purchasing the Products or paying less for  
 28 them.

1           102. Defendant's acts and omissions are likely to deceive the general public.

2           103. Defendant engaged in these false, misleading and deceptive advertising and  
3 marketing practices to increase its profits. Accordingly, Defendant has engaged in false  
4 advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and  
5 Professions Code.

6           104. The aforementioned practices, which Defendant used, and continues to use, to its  
7 significant financial gain, also constitute unlawful competition and provide an unlawful  
8 advantage over Defendant's competitors as well as injury to the general public.

9           105. As a direct and proximate result of such actions, Plaintiffs and the other subclass  
10 members have suffered, and continue to suffer, injury in fact and have lost money and/or  
11 property as a result of such false, deceptive and misleading advertising in an amount which will  
12 be proven at trial, but which is in excess of the jurisdictional minimum of this Court. In  
13 particular, Plaintiffs, and those similarly situated, paid a price premium for the Products, i.e., the  
14 difference between the price consumers paid for the Products and the price that they would have  
15 paid but for Defendant's false, deceptive and misleading advertising. This premium can be  
16 determined by using econometric or statistical techniques such as hedonic regression or conjoint  
17 analysis. Alternatively, Plaintiffs and those similarly situated will seek a full refund of the price  
18 paid upon proof that the sale of the Products was unlawful.

19           106. Plaintiffs seek equitable relief, including restitution, with respect to their FAL  
20 claims. Pursuant to Federal Rule of Civil Procedure 8(e)(2), Plaintiffs makes the following  
21 allegations in this paragraph only hypothetically and as an alternative to any contrary allegations  
22 in their other causes of action, in the event that such causes of action will not succeed. Plaintiffs  
23 and the Class may be unable to obtain monetary, declaratory and/or injunctive relief directly  
24 under other causes of action and will lack an adequate remedy at law, if the Court requires them  
25 to show classwide reliance and materiality beyond the objective reasonable consumer standard  
26 applied under the FAL, because Plaintiffs may not be able to establish each Class member's  
27 individualized understanding of Defendant's misleading representations as described in this  
28 Complaint, but the FAL does not require individualize proof of deception or injury by absent



1 class members. *See, e.g., Ries v. Ariz. Bevs. USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012)  
 2 (“restitutionary relief under the UCL and FAL ‘is available without individualized proof of  
 3 deception, reliance, and injury.’”).

4 107. Plaintiffs seek, on behalf of themselves and those similarly situated, a declaration  
 5 that the above-described practices constitute false, misleading and deceptive advertising.

6 108. Plaintiffs seek, on behalf of themselves and those similarly situated, an injunction  
 7 to prohibit Defendant from continuing to engage in the false, misleading and deceptive  
 8 advertising and marketing practices complained of herein. Such misconduct by Defendant, unless  
 9 and until enjoined and restrained by order of this Court, will continue to cause injury in fact to the  
 10 general public and the loss of money and property in that Defendant will continue to violate the  
 11 laws of California, unless specifically ordered to comply with the same. This expectation of  
 12 future violations will require current and future consumers to repeatedly and continuously seek  
 13 legal redress in order to recover monies paid to Defendant to which they are not entitled. Plaintiff,  
 14 those similarly situated and/or other consumers nationwide have no other adequate remedy at law  
 15 to ensure future compliance with the California Business and Professions Code alleged to have  
 16 been violated herein.

17 **PLAINTIFFS’ THIRD CAUSE OF ACTION**  
 18 **(Common Law Fraud, Deceit and/or Misrepresentation)**  
 19 **On Behalf of Plaintiffs and the Class**

20 109. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action  
 21 Complaint as if set forth herein.

22 110. Defendant has fraudulently and deceptively informed Plaintiffs that the Products  
 23 are healthful sources of nutrients.

24 111. These misrepresentations and omissions were known exclusively to, and actively  
 25 concealed by, Defendant, not reasonably known to Plaintiffs, and material at the time they were  
 26 made. Defendant knew or should have known the composition of the Products, and knew or  
 27 should have known that the fortifying the Products is disapproved by the FDA, and when done in  
 28 conjunction with health claims is prohibited by the FDA, and in either instance results in  
 misleading consumers. Defendant’s misrepresentations and omissions concerned material facts

1 that were essential to the analysis undertaken by Plaintiffs as to whether to purchase Defendant's  
 2 Products. In misleading Plaintiffs and not so informing Plaintiffs, Defendant breached its duty to  
 3 them. Defendant also gained financially from, and as a result of, its breach.

4 112. Plaintiffs and those similarly situated relied to their detriment on Defendant's  
 5 misrepresentations and fraudulent omissions. Had Plaintiffs and those similarly situated been  
 6 adequately informed and not intentionally deceived by Defendant, they would have acted  
 7 differently by, without limitation: (i) declining to purchase the Products, (ii) purchasing less of  
 8 them, or (iii) paying less for the Products.

9 113. By and through such fraud, deceit, misrepresentations and/or omissions, Defendant  
 10 intended to induce Plaintiffs and those similarly situated to alter their position to their detriment.  
 11 Specifically, Defendant fraudulently and deceptively induced Plaintiffs and those similarly  
 12 situated to, without limitation, purchase the Products.

13 114. Plaintiffs and those similarly situated justifiably and reasonably relied on  
 14 Defendant's misrepresentations and omissions, and, accordingly, were damaged by Defendant.

15 115. As a direct and proximate result of Defendant's misrepresentations and/or  
 16 omissions, Plaintiffs and those similarly situated have suffered damages, including, without  
 17 limitation, the amount they paid for the Products.

18 116. Defendant's conduct as described herein was wilful and malicious and was  
 19 designed to maximize Defendant's profits even though Defendant knew that it would cause loss  
 20 and harm to Plaintiffs and those similarly situated.

21 **PLAINTIFFS' FOURTH CAUSE OF ACTION**  
 22 **(Unlawful, unfair, and fraudulent trade practices violation of Business and Profes-**  
 23 **sions Code § 17200, *et seq.*)**  
**On Behalf of Plaintiffs and the Subclass**

24 117. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action  
 25 Complaint as if set forth herein.

26 118. Within four (4) years preceding the filing of this lawsuit, and at all times  
 27 mentioned herein, Defendant has engaged, and continues to engage, in unlawful, unfair, and  
 28 fraudulent trade practices in California by engaging in the unlawful, unfair, and fraudulent

1 business practices outlined in this complaint.

2 119. In particular, Defendant has engaged, and continues to engage, in unlawful  
3 practices by, without limitation, violating the following state and federal laws: (i) the CLRA as  
4 described herein; (ii) the FAL as described herein; (iii) the advertising provisions of the Sherman  
5 Law (Article 3), including without limitation, California Health & Safety Code §§ 110390,  
6 110395, 110398 and 110400; (iv) the misbranded food provisions of the Sherman Law (Article  
7 6), including without limitation, California Health & Safety Code §§ 110660, 110665, 110705,  
8 110760, 110765, and 110770; and (v) and federal laws regulating the advertising and branding of  
9 food in 21 U.S.C. § 343(a), *et seq.* and FDA regulations, including but not limited to 21 C.F.R.  
10 104.20, and 21 C.F.R. 101.65(d), which are incorporated into the Sherman Law (California  
11 Health & Safety Code §§ 110100(a), 110380, and 110505).

12 120. In particular, Defendant has engaged, and continues to engage, in unfair and  
13 fraudulent practices by, without limitation, the following: (i) misrepresenting that the Products are  
14 healthful sources of nutrients and probiotics; and (ii) fortifying its alcoholic, carbonated  
15 beverages in violation of FDA guidance and regulations.

16 121. Plaintiffs and those similarly situated relied to their detriment on Defendant  
17 unlawful, unfair, and fraudulent business practices. Had Plaintiffs and those similarly situated  
18 been adequately informed and not deceived by Defendant, they would have acted differently by,  
19 without limitation: (i) declining to purchase the Products, (ii) purchasing less of the Products, or  
20 (iii) paying less for the Products.

21 122. Defendant's acts and omissions are likely to deceive the general public.

22 123. Defendant engaged in these deceptive and unlawful practices to increase its  
23 profits. Accordingly, Defendant has engaged in unlawful trade practices, as defined and  
24 prohibited by section 17200, *et seq.* of the California Business and Professions Code.

25 124. The aforementioned practices, which Defendant has used to its significant  
26 financial gain, also constitute unlawful competition and provide an unlawful advantage over  
27 Defendant's competitors as well as injury to the general public.

28 125. As a direct and proximate result of such actions, Plaintiffs and the other subclass

1 members, have suffered and continue to suffer injury in fact and have lost money and/or  
 2 property as a result of such deceptive and/or unlawful trade practices and unfair competition in  
 3 an amount which will be proven at trial, but which is in excess of the jurisdictional minimum of  
 4 this Court. In particular, Plaintiffs and those similarly situated paid a price premium for the  
 5 Products, i.e., the difference between the price consumers paid for the Products and the price that  
 6 they would have paid but for Defendant's misrepresentation. This premium can be determined  
 7 by using econometric or statistical techniques such as hedonic regression or conjoint analysis.  
 8 Alternatively, Plaintiffs and those similarly situated will seek a full refund of the price paid upon  
 9 proof that the sale of the Products was unlawful.

10 126. As a direct and proximate result of such actions, Defendant has enjoyed, and  
 11 continues to enjoy, significant financial gain in an amount which will be proven at trial, but which  
 12 is in excess of the jurisdictional minimum of this Court.

13 127. Plaintiffs seek, on behalf of themselves and those similarly situated, equitable  
 14 relief, including restitution for the premium and/or the full price that they and others paid to  
 15 Defendant as result of Defendant's conduct. Plaintiffs and the Class lack an adequate remedy at  
 16 law to obtain such relief with respect to their "unfairness" claims in this UCL cause of action,  
 17 because there is no cause of action at law for "unfair" conduct. Plaintiffs and the Class similarly  
 18 lack an adequate remedy at law to obtain such relief with respect to their "unlawfulness" claims  
 19 in this UCL cause of action because the Sherman Law (Articles 3 and 6) and the Federal laws  
 20 and regulations referenced herein do not provide a direct cause of action, so Plaintiffs and the  
 21 Class must allege those violations as predicate acts under the UCL to obtain relief.

22 128. Plaintiffs also seeks equitable relief, including restitution, with respect to their  
 23 UCL unlawfulness claims for violations of the CLRA, FAL and her UCL "fraudulent" claims.  
 24 Pursuant to Federal Rule of Civil Procedure 8(e)(2), Plaintiffs make the following allegations in  
 25 this paragraph only hypothetically and as an alternative to any contrary allegations in their other  
 26 causes of action, in the event that such causes of action do not succeed. Plaintiffs and the Class  
 27 may be unable to obtain monetary, declaratory and/or injunctive relief directly under other  
 28 causes of action and will lack an adequate remedy of law, if the Court requires them to show

1 classwide reliance and materiality beyond the objective reasonable consumer standard applied  
 2 under the UCL, because Plaintiffs may not be able to establish each Class member's  
 3 individualized understanding of Defendant's misleading representations as described in this  
 4 Complaint, but the UCL does not require individualized proof of deception or injury by absent  
 5 class members. *See, e.g., Stearns v Ticketmaster*, 655 F.3d 1013, 1020, 1023-25 (distinguishing,  
 6 for purposes of CLRA claim, among class members for whom website representations may have  
 7 been materially deficient, but requiring certification of UCL claim for entire class). In addition,  
 8 Plaintiffs and the Class may be unable to obtain such relief under other causes of action and will  
 9 lack an adequate remedy at law, if Plaintiffs are unable to demonstrate the requisite *mens rea*  
 10 (intent, reckless, and/or negligence), because the UCL imposes no such *mens rea* requirement  
 11 and liability exists even if Defendant acted in good faith.

12 129. Plaintiffs seek, on behalf of themselves and those similarly situated, a declaration  
 13 that the above-described trade practices are fraudulent, unfair, and/or unlawful.

14 130. Plaintiffs seek, on behalf of themselves and those similarly situated, an injunction  
 15 to prohibit Defendant from continuing to engage in the deceptive and/or unlawful trade practices  
 16 complained of herein. Such misconduct by Defendant, unless and until enjoined and restrained  
 17 by order of this Court, will continue to cause injury in fact to the general public and the loss of  
 18 money and property in that Defendant will continue to violate the laws of California, unless  
 19 specifically ordered to comply with the same. This expectation of future violations will require  
 20 current and future consumers to repeatedly and continuously seek legal redress in order to  
 21 recover monies paid to Defendant to which they were not entitled. Plaintiffs, those similarly  
 22 situated and/or other consumers nationwide have no other adequate remedy at law to ensure  
 23 future compliance with the California Business and Professions Code alleged to have been  
 24 violated herein.

**PLAINTIFFS' FIFTH CAUSE OF ACTION**  
**(Unjust Enrichment)**  
**On Behalf of Plaintiffs and the Class**

25 131. Plaintiffs reallege and incorporate by reference all paragraphs alleged herein.

26 132. Plaintiffs and members of the Class conferred a benefit on the Defendant by  
 27  
 28

1 purchasing the Products.

2 133. Defendant has been unjustly enriched in retaining the revenues from Plaintiffs' and  
 3 Class Members' purchases of the Products, which retention is unjust and inequitable, because  
 4 Defendant falsely represented that the Products are healthful sources of nutrients when, in fact,  
 5 the Products are not healthful and FDA guidelines provide that carbonated and alcoholic  
 6 beverages should not be fortified with nutrients. This harmed Plaintiffs and members of the class  
 7 because they paid a price premium as a result.

8 134. Because Defendant's retention of the non-gratuitous benefit conferred on them by  
 9 Plaintiffs and Class members is unjust and inequitable, Defendant must pay restitution and  
 10 nonrestitutionary disgorgement of profits to Plaintiffs and the Class members for its unjust  
 11 enrichment, as ordered by the Court. Plaintiffs and those similarly situated have no adequate  
 12 remedy at law to obtain this relief.

13 135. Plaintiffs, therefore, seek an order requiring Defendant to make restitution and  
 14 pay nonrestitutionary disgorgement of profits to his and other members of the Class.

### 15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiffs, on behalf of themselves and those similarly situated,  
 17 respectfully request that the Court enter judgement against Defendant as follows:

18 A. Certification of the proposed Classes, including appointment of Plaintiffs' counsel  
 19 as class counsel;

20 B. An order temporarily and permanently enjoining Defendant from continuing the  
 21 unlawful, deceptive, fraudulent, and unfair business practices alleged in this Complaint;

22 C. An award of compensatory damages in an amount to be determined at trial, except  
 23 as to those causes of action where compensatory damages are not available at law;

24 D. An award of statutory damages in an amount to be determined at trial, except as to  
 25 those causes of action where statutory damages are not available at law;

26 E. An award of punitive damages in an amount to be determined at trial, except as to  
 27 those causes of action where punitive damages are not available at law;

28 F. An award of treble damages, except as to those causes of action where treble

1 damages are not available at law;

2 G. An award of restitution in an amount to be determined at trial, except as to those  
3 causes of action where restitution is not available at law;

4 H. An award of nonrestitutionary disgorgement of profits in an amount to be  
5 determined at trial, except as to those causes of action where restitution is not available at law;

6 H. An order requiring Defendant to pay both pre- and post-judgment interest on any  
7 amounts awarded;

8 I. For reasonable attorneys' fees and the costs of suit incurred; and

9 J. For such further relief as this Court may deem just and proper.

10 **JURY TRIAL DEMANDED**

11 Plaintiffs hereby demand a trial by jury.

12 Dated: July 1, 2022

**GUTRIDE SAFIER LLP**

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14  
15 

16  
17 Seth A. Safier, Esq.  
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21 San Francisco, CA 94111  
22  
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24  
25  
26  
27  
28



**EXHIBIT A**

I, Lisa Starratt, declare:

1. I am the Plaintiff in this action. If called upon to testify, I could and would competently testify to the matters contained herein based upon my personal knowledge.

2. I submit this Declaration pursuant to California Civil Code § 1780(d), California Code of Civil Procedure § 2015.5, and 28 U.S.C. § 1746.

3. I reside in Walnut Creek, California. I purchased Flying Embers Hard Seltzer variety packs on multiple occasions in 2020 and 2021, including on May 14, 2021, from Total Wine in Pleasant Hill, California.

I declare under penalty of perjury under the laws of California and of the United States of America that the foregoing is true and correct.

Executed in Walnut Creek, California on 6/30/2022

DocuSigned by:

LISA STARRATT

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Lisa Starratt